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No. 71-112

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1971

GEORGE SERIEN GEBHART,
DAVID FLEMING WHITFIELD and
HAROLD CORDELL SMITH

PETITIONERS

vs.

UNITED STATES OF AMERICA

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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COURT INDEX PRESS, INC. — Law Printers — 809 Walnut Street, Cincinnati, Ohio 45202

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vs.

UNITED STATES OF AMERICA

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Your Petitioners, George Serien Gebhart, David Fleming Whitfield, and Harold Cordell Smith, pray that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Sixth Circuit, entered on May 7, 1971.

OPINION BELOW

The Opinion of the Court below is reported at 441 F.2d 1261. No written Opinion was rendered by the District Court.

JURISDICTION

The Judgment of the Court below was entered on May 7, 1971. A timely Petition for Rehearing was denied on June 24, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

I. Whether an Affidavit for Search Warrant involving alleged violation of 18 U.S.C. § 1952 (The Travel Act) must state the time (year, month and/or day) the travel in interstate commerce or the use of any facility in interstate commerce took place in order to establish probable cause for the issuance of the search warrant.

II. Whether an Affidavit for Search Warrant involving alleged violation of 18 U.S.C. § 1952 (The Travel Act) must state the facility used in interstate commerce, or who traveled interstate, and where to and from, in order to establish probable cause for the issuance of the Search Warrant.

III. Where the Federal Government prosecutes only five (5) establishments in one local community for violation of 18 U.S.C. § 1952 (The Travel Act) because of alleged use of interstate facilities to promote and conduct bingo games alleged to be gambling and an unlawful activity under state law, while at the same time it has knowledge of thousands of similar violations occurring in the same locality and throughout the rest of the United States and its possessions, many of which activities are being conducted by the Federal Government itself, do the prosecutions constitute an invidious discrimination against Petitioners denying them the right to due process under the Fifth Amendment?

APPLICABLE CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

These are set out verbatim in Appendix A. (pp. 17-18).

STATEMENT OF FACTS

Petitioners were indicted on four counts of using and one count of conspiracy to use facilities of interstate commerce to promote gambling in the forms of bingo games in violation of *18 U.S.C. §§ 1925 (a) (3) and (b)*.

The indictments were the result of a raid on March 1, 1968 by FBI agents who made the search and seized certain paraphernalia and equipment pursuant to a search warrant issued by the U.S. Commissioner.

On March 11, 1968, Petitioners moved the District Court to suppress these items as evidence and for their return. A hearing was held on these Motions on that date and they were overruled by the Court on March 12, 1968.

Petitioners were tried by Jury and were convicted on each of the counts for which they were indicted and sentenced to concurrent sentences of one year and a day.

On March 1, 1968, FBI Special Agent, John M. Barry, executed an Affidavit for the Search Warrant before the United States Commissioner for the Eastern District of Kentucky. The Search Warrant, based solely upon this Affidavit, authorized a search of the Petitioners' establishment. A raid was conducted by fifteen FBI Special Agents pursuant to said Search Warrant on March 1, 1968. A large number of items were seized and subsequently introduced by the Government at the trial of these Petitioners. The Affidavit itself reads as follows:

(CAPTION OMITTED)

AFFIDAVIT FOR SEARCH WARRANT

The undersigned, being duly sworn deposes and says:

That he is positive that on the premises known as 10 Licking Pike, Wilder, Kentucky, being a one-story masonry

fully detached building known as the Latin Quarter, in the Eastern District of Kentucky, there is now being concealed certain property, namely gambling paraphernalia including, but not limited to, sound amplifying equipment, records, books of account, money, safes, ledgers, correspondence, bingo cards, premium cards, checkbooks, and number selection equipment which are the fruits and instrumentalities of violations of Section 1952, Title 18, United States Code.

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as per attached affidavit.

/s/ John M. Barry,
Special Agent, FBI

AFFIDAVIT

John M. Barry, being duly sworn, does hereby depose and say as follows:

(1) I am a Special Agent of the Federal Bureau of Investigation (FBI), United States Department of Justice, having been so employed for approximately fourteen (14) years, since 1956 being assigned to the Covington, Kentucky Resident Agency;

(2) From September 12, 1966, Affiant has been assigned as the case agent in the conduct of investigations of violations of Title 18, United States Code, Section 1952, involving the use of facilities in interstate commerce to carry on gambling operations in violation of the laws of the State of Kentucky, particularly the conduct of gambling operations at the Latin Quarter, 10 Licking Pike, Wilder, Kentucky.

(3) That in the conduct of the investigation, Affiant

has conducted physical surveillances, made inquiries and that Affiant has Supervised the investigations conducted by other Special Agents in other offices of the FBI;

(4) On or about January 17, 1968, Special Agent Charles L. Lutes, assigned to the investigation of the Latin Quarter, 10 Licking Pike, Wilder, Kentucky, and that he had played bingo from 8:30 P.M. until approximately 11:10 P.M. on January 11, 1967. The bingo games consisted of regular bingo games for the initial cost of $1.50 per card. Thereafter, individual games were played at the cost of $.25 per card per game, which money was collected after each game.

This establishment has a large bingo room, a bar area, and a room off the bar. Upon entering the establishment there is a table on the right and a table on the left upon which are bingo cards. Upon selecting bingo cards, players proceed directly ahead a few feet where they deposit $1.50 per card in a container marked "Speers Society Benefit." From there most players proceed on into the main bingo room although some can play in the bar area and the smaller room adjacent to the bar area. Just inside the entrance to the main bingo room and on the left is a table where prize money is handled. At the other end of the main bingo room is a platform upon which is a table containing bingo equipment. Also at the table is a microphone which is used by the caller.

(5) Special Agent Charles L. Lutes advised the Affiant that on January 19, 1968, he entered the Latin Quarter and beginning at 8:30 P.M. he played ten regular games of bingo for which he paid $1.50 per card, putting the money in a container marked "Speers Society Benefit";

(6) Special Agent Charles L. Lutes advised the Affiant that on January 25, 1968, he entered the Latin Quarter and beginning at 8:30 P.M. he played ten regular games

of bingo for which he paid $1.50 per card, putting the money in a container marked "Speers Society Benefit";

(7) That Special Agent Charles L. Lutes has informed the Affiant that on each occasion on which he played bingo at the Latin Quarter the bingo cards he used bore the trademark of Bingo King, Englewood, Colorado, and bore a sketch of the Latin Quarter with the name "Latin Quarter" thereon. Special Agent Charles L. Lutes also advised the Affiant that on each occasion he played bingo at the Latin Quarter, he estimated that there were from 250 to 300 players playing bingo in the main bingo room;

(8) Special Agent Charles L. Lutes advised the Affiant that on each occasion he played bingo at the Latin Quarter, players were given duplicate coupons for drawings on subsequent nights. Printing on these tickets indicated they were printed for the Latin Quarter, Newport, Kentucky, by the Globe Ticket Company, Philadelphia;

(9) That on March 1, 1968 at 8:41 P.M., Affiant was informed by Special Agent Harry Belk that there are now being conducted bingo games at the Latin Quarter, 10 Licking Pike, Wilder, Kentucky, involving the use of bingo equipment including bingo cards, number selection equipment, checkbook and;

On the basis of the foregoing the Affiant has probable cause to believe that facilities in interstate commerce to wit: the mails and air freight, were used and are being used to carry on gambling operations in violation of the laws of the State of Kentucky, at the Latin Quarter, 10 Licking Pike, Wilder, Kentucky, in violation of Section 1952 of Title 18, United States Code, and that Affiant is positive that there is now contained on the premises at 10 Licking Pike, Wilder, Kentucky, gambling paraphernalia including but not limited to sound amplifying equipment, records, books of account, money, safes, ledgers, cor-

respondence, bingo cards, premium cards, checkbooks, and number selection equipment.

Affiant has been advised by investigating agent that a condition of participating in bingo games, he was required to purchase bingo cards for prices stated in this affidavit.

(s) John M. Barry,
Special Agent, FBI

Prior to trial, Petitioners filed a "Plea in Abatement and Motion to Dismiss" the Indictment. Evidence was presented on this Motion and it was overruled by the District Court.

The gambling that the Petitioners were accused of promoting by the use of interstate facilities was the game of bingo in violation of Kentucky's lottery laws. *Kentucky Constitution § 226, KRS. 436.200, 436.360, 436.370.* In the immediate area of these Petitioners' establishment, there were various other organizations actually conducting bingo games. There were fourteen such places in Kenton and Campbell Counties, Kentucky; thirty-eight such organizations in Jefferson County, Kentucky, and fifty-five in Hamilton County, Ohio.

An official of the Bingo King Company of Englewood, Colorado, testified that bingo equipment was shipped in interstate commerce to various government installations in all fifty states. On his lists were:

—84 Naval installations under the heading "FPO" (Fleet Post Office)

—110 Army installations under the heading "APO San Francisco" (Army Post Office)

—357 installations which are domestic bases of the Army, including Wives' Clubs, NCO Clubs, and Officers' Clubs

—336 Navy ships

—182 installations under the heading "APO New York"

—125 miscellaneous government installations such as Veterans Administration Hospitals, General Services Administration, etc.

Also, introduced into evidence were: (a) Army Regulation 230-60CI, page 9, which states: "The playing of bingo at Army installations is authorized provided the following principles are rigidly observed: . . . ."; (b) Air Force Manual, page 16, No. 330, Chapter 4, which states: "Bingo may be played in open messes on installations within the United States (including Alaska and Hawaii), its territories, and possessions which are fully ceded. Bingo may also be played on those installations which are not fully ceded where the playing of bingo is allowed by the state, territory or possession,"; (c) Navy, Operating Policy, Section 1, General page 25, No. 1015 states: "Subject to the following regulations, the playing of bingo is authorized in Navy messes on Naval Installations within the United States, its territories and possessions, which are fully ceded — also on those installations which are not fully ceded where the playing of these games is allowed by the state concerned."

On April 17, 1968, the Grand Jury for the United States District Court for the Eastern District of Kentucky returned indictments against the operators of only five bingo parlors, each located in Campbell County, Kentucky. It was stipulated by the parties that prior to these indictments under *18 U.S.C. § 1952,* there had been no previous federal indictments charging a violation of said Statute founded solely upon an illegal state lottery in the form of bingo.

The United States did not introduce any proof to controvert the Petitioners' contention that these prosecutions were arbitrary and discriminatory.

REASONS FOR GRANTING THE WRIT

I. The failure of the Court of Appeals for the Sixth Circuit to invalidate a search made pursuant to affidavit which did not contain a statement setting forth the time (year, month and/or day) when travel in or use of a facility in interstate commerce in a prosecution under 18 U.S.C. § 1952 (The Travel Act) took place, is in conflict with its own prior decisions and with decisions of Courts of Appeal of other circuits.

Petitioners were charged with violating *18 U.S.C. § 1952*, the applicable portions being:

> "(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to . . . (3) otherwise promote, manage, establish, carry on or facilitate the promotion, management, establishment, or carrying on of any unlawful activity . . . ."
>
> "(b) As used in this section 'unlawful activity' means (1) any business enterprise involving gambling . . . ."

One of the essential elements of a violation of *18 U.S.C. § 1952* must be either the travel or use of a facility in interstate commerce. The Affidavit for Search Warrant in this case did not contain any statement that anyone, at any time, ever traveled in interstate commerce or used any facility in interstate commerce. Therefore, the Affidavit did not set forth probable cause to sustain the issuance of a search warrant. The Affidavit did set forth dates and times on which bingo games were being conducted on the premises to be searched; however, there could be no violation of *18 U.S.C. § 1952* until someone, at some time, traveled in interstate commerce or used a facility in interstate commerce.

Prior to the case of *United States* v. *Ventresca,* 380 U.S. 102, 13 L.Ed2d 684, 85 S.Ct. 741 (1965), it was well established that an Affidavit for a Search Warrant which failed to set forth the time of the occurrences alleged was insufficient to establish probable cause. *Staker* v. *United States,* 5 F.2d 312 (6th Cir. 1925); *Kohler* v. *United States,* 9 F.2d 23 (9th Cir. 1925); *Poldo* v. *United States,* 55 F.2d 866 (9th Cir. 1932); *United States* v. *Bosch,* 209 F.Supp. 15 (E.D. Mich. 1962). Since *Ventresca,* there is confusion as to what is "common sense" and what is "technical."

The Court of Appeals for the First Circuit in *Rosencranz* v. *United States,* 356 F.2d 310 (1966), held that the *Ventresca case* did not change the requirement of a statement as to the time of the essential acts. However, the Court of Appeals for the Second Circuit in *United States* v. *Conti,* 361 F.2d 153, apparently construed *Ventresca* in a different manner in upholding an affidavit.

The *Rosencranz* decision is directly in conflict with the way the Sixth Circuit ruled in this case. The reasoning behind *Rosencranz* is especially applicable here because *18 U.S.C. § 1952,* under which Petitioners were prosecuted, became effective on September 13, 1961. Time was of the essence. The possibility existed that the travel or use of interstate facilities to acquire the bingo equipment occurred *prior* to the enactment of the law. This 'possibility' was conceded by the United States in its footnote 3 on page 6 of its Brief for Appellee filed in the Sixth Circuit.

While the Sixth Circuit followed *Rosencranz* in *United States* v. *Boyd,* 422 F.2d 792 (1970), it failed to do so in this case, without any reason.

This Court should grant the Writ of Certiorari so it can decide whether a statement of time in an affidavit for search warrant in an *18 U.S.C. § 1952* violation is a technicality under *Ventresca* which does not invalidate a war-

rant, or whether the failure to include time in the affidavit is a violation of the Petitioners' rights under the Fourth Amendment to the Constitution, and under Rule 41, Rules of Criminal Procedure, requiring the suppression of evidence. This issue of time seems to have been presented to this Court in *Spinelli* v. *United States,* 393 U.S. 410, 21 L.Ed. 2d 637, 89 S.Ct. 584 (1969), but was not decided because the affidavit was found to be deficient in other respects. The time has arrived when this issue should be decided.

At this point, it is important to comment on how the Court of Appeals for the Sixth Circuit treated this issue. The Opinion merely states: "We have considered all other issues raised by Appellants and find them without merit." (Appendix B, p. 25). Nothing more was said about Petitioners' claim concerning the Affidavit for Search Warrant.

The issue had been thoroughly briefed by both parties and consumed the majority of the oral argument time in the Sixth Circuit. In the Petition for Rehearing, we urged the Sixth Circuit to ". . . either distinguish or overrule the *Rosencranz case.*" However, the Petition for Rehearing was overruled without any comment whatsoever on the issue (Appendix D, p. 29).

II. The question of whether an affidavit for a search warrant in connection with a violation of 18 U.S.C. § 1952 (The Travel Act) must set forth specifically the facility of interstate commerce used to promote the carrying on of an unlawful activity is one of great importance in the administration of criminal justice and should be decided by this Court.

18 U.S.C. § 1952 requires the travel in interstate commerce or the use of any facility in interstate commerce.

There is no statement of fact in the Affidavit for Search Warrant that any Petitioner or anyone connected with the premises known as the Latin Quarter (subject of the Search Warrant) either traveled in or used facilities in interstate commerce to carry on the bingo games being held there.

The Special Agent of the FBI who made the Affidavit stated that he *believed* that the mails and air freight were being used to facilitate the bingo games, but there were no facts to support this conclusion and, thus, it cannot establish probable cause. *Aguilar* v. *Texas,* 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964); *Giordenello* v. *United States,* 357 U.S. 480, 78 S.Ct. 1245, 2 L.Ed.2d 1503 (1958).

The District Court in *Silbert* v. *United States,* 289 F. Supp. 318 (D.C. Md. 1968), considered a similar affidavit and noted:

> "The interstate facts are far too speculative to support probable cause for the issuance of warrants solely on the basis of alleged Section 1952 violations. The affidavits are not specific as to the mode of interstate facilities used, the manner by which such use facilitated gambling, and many other relevant details."

Petitioners contend that to support probable cause for an alleged *18 U.S.C. § 1952* violation it is necessary to allege in the affidavit either (a) that someone connected with the premises which are the subject of the search warrant traveled in interstate commerce, when and where he traveled and that the travel facilitated the unlawful activity, or (b) that a certain interstate facility was used on a certain date, from what city and state this use both originated and terminated, and that it facilitated the unlawful activity.

As prosecutions under *18 U.S.C. § 1952* continue with attendant searches and seizures, it is important that this

Court determine the minimum standards for establishing probable cause in an affidavit for a search warrant alleging a violation of *18 U.S.C. § 1952.*

III. The decision of the Sixth Circuit Court of Appeals that selecting five bingo establishments in one local community and charging them with a violation of 18 U.S.C. § 1952 (The Travel Act) while at the same time the federal government stipulated that there were no previous indictments under 18 U.S.C. § 1952 founded upon an illegal state lottery in the form of bingo, when it had knowledge of thousands of similar operations in the same locality and throughout the United States and its possessions, many being operated by The Federal Government itself, did not constitute an invidious discrimination violating the rights of the Petitioners to due process under the Fifth Amendment, is in conflict with prior decisions of this Court, and is an important Constitutional Question that should be decided by this Court.

Tens of thousands of organizations throughout the fifty states conduct bingo games using equipment bought from the Bingo King Company of Englewood, Colorado, the supplier of the equipment used by these Petitioners. The overwhelming majority of these states prohibit lotteries and bingos. The branches of the military service of the United States Government encourage bingo games by their official regulations and some 1816 military and government installations order and receive equipment from the Bingo King Company. Hundreds of bingo games are conducted in the same state as the Petitioners conducted theirs, and similar games were and are conducted in the same county and in the adjoining county.

Only five (5) operators — these Petitioners and four other bingo game operators in Campbell County, Kentucky, were selected for prosecution by the Federal Government, out of the many thousands of bingo game operations in the United States. The Sixth Circuit on page 6 of its Opinion (Appendix B, p. 24) verifies this fact:

> "The parties stipulated that prior to the indictments under 18 U.S.C. § 1952 (a)-(3) in Eastern Kentucky during 1968, there had been no previous federal indictments charging a violation of 18 U.S.C. § 1952 founded solely upon an illegal state lottery in the form of bingo."

The Fifth Amendment, applicable to the federal government, demands due process of law. *Bolling* v. *Sharpe*, 347 U.S. 497, 75 S.Ct. 693, 98 L.Ed. 884 (1954); *Hirabayshi* v. *United States*, 320 U.S. 81, 63 S.Ct. 1375, 87 L.Ed. 1774 (1943); *Detroit Bank* v. *United States*, 317 U.S. 329, 63 S.Ct. 297, 87 L.Ed. 304 (1943). "But the concepts of equal protection and due process, both stemming from our American ideal of fairness are not mutually exclusive" and "discrimination may be so unjustifiable as to be violative of due process." *Bolling* v. *Sharpe, supra.* The Due Process Clause of the Fifth Amendment contains the same pledge of the protection of equal laws as does the Fourteenth Amendment and for this reason precedents arising under the Fourteenth Amendment should be freely utilized. *Washington* v. *United States*, 401 F.2d 915 (1968).

In *Yick Wo* v. *Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1885), this Court stated:

> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances,

material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

These Petitioners contend that this prosecution is an invidious discrimination against them as there are tens of thousands of others in this country conducting exactly the same type of bingo game, using interstate facilities in doing so, and yet they are not and have never been prosecuted under federal laws. The federal government itself indulges in the practice; yet these Petitioners have been separated from all the rest of the United States and brought to the bar of justice. This discrimination amounts to a denial of due process of law and would, if this were a state prosecution, be a denial of equal protection of the laws.

In *Snowden* v. *Hughes,* 321 U.S. 1, 8, 64 S.Ct. 397, 401, 88 L.Ed. 497 (1944), this Court said:

> "The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination. This may appear on the face of the action taken with respect to a particular class or person, or it may only be shown by extrinsic evidence showing a discriminatory design to favor one individual or class over another not to be inferred from the action itself. But a discriminatory purpose is not presumed, there must be a showing of clear and intentional discrimination."

Petitioners contend that they are in a unique position. They are unable to show that the prosecution is based upon an "inherently suspect classification" or "unjustifiable standard." (Sixth Circuit Opinion, Appendix B, p. 25) because there are no other prosecutions to compare this one

with. Therefore, no standards could be established or classification determined.

This is the ultimate form of discrimination. There was never a prosecution of this kind before despite the large numbers of obvious violations.

Applying the principle enunciated in *Yick Wo* to the situation in this case where there is no classification or standard due to the total and complete lack of other prosecutions, an important constitutional question is presented which should be decided by this Court.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Constitutional Provisions, Statutes and Rules

Fourth Amendment, Constitution of the United States

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment, Constitution of the United States

. . . nor shall any person . . . be deprived of life, liberty or property without due process of law . . .

18 U.S.C. § 1952

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to —

1) distribute the proceeds of any unlawful activity; or
2) commit any crime of violence to further any unlawful activity; or
3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000.00 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on

which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor or narcotics shall be conducted under the supervision of the Secretary of the Treasury.

APPENDIX B

Nos. 20425-426-427

UNITED STATES COURT OF APPEALS
for the Sixth Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
GEORGE SERIAN GEBHART, DAVID FLEMING WHITFIELD, HAROLD CORDELL SMITH,
Defendants-Appellants.

APPEAL from the United States District Court for the Eastern District of Kentucky.

Decided and Filed May 7, 1971.

Before: CELEBREZZE and MILLER, Circuit Judges, and O'SULLIVAN, Senior Circuit Judge.

CELEBREZZE, Circuit Judge. This is an appeal from the United States District Court for the Eastern District of Kentucky. Appellants were indicted on four counts of

using and one count of conspiring to use the facilities of interstate commerce to promote gambling in violation of 18 U.S.C. §§ 1952(a) (3) and (b) (1954).[1] Appellants were convicted on each of the counts for which indicted and sentenced to concurrent sentences of one year and a day.

At trial, there was substantially unrebutted testimony that the Appellants managed, carried on and promoted the game of bingo at the Latin Quarter, Wilder, Kentucky, on a continuous basis since 1964. Further, in the operation of the bingo game, the Appellants utilized several thousand bingo cards and assorted bingo paraphernalia and equipment which had stamped upon it the trademark of Bingo King Company, Englewood, Colorado. The President and another employee of Bingo King Company testified that the Company's records showed that over a period of several years they had received in Englewood, Colorado, by telephone and by mail, orders for a variety of bingo equipment and materials from a person who represented himself to be one of the Appellants. There was direct testimony such orders were filled through the United States mails; and in the evidence seized at the time of the raid on the Latin Quarter, large amounts of materials and equipment bearing the Bingo King trademark and patents were found.

Several issues are raised on appeal. Before discussing these issues, we first consider the elements which the Government is required to prove to establish a violation of Title 18, Section 1952(a) (3). Title 18, Section 1952 (1964) provided that:

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[1] Title 18, Sections 1952(b) and (c) were amended in 1970 by Public Law 91-513, Title II § 701(i)(2). Those amendments are not relevant to the questions raised in this case and, in any event, did not take effect until more than two years after the commencement of the instant prosecutions. Public Law 91-513, § 702, October 27, 1970.

"(a) Whoever . . . uses any facility in interstate commerce or foreign commerce, including the mail, with intent to

. . .

"(3) otherwise promote, manage, establish, carry on or facilitate the promotion, management, establishment, or carrying on of any unlawful activity, and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2) and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

"(b) As used in this section 'unlawful activity' means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States. . . ."

To successfully prosecute one under the above statutory provision, the United States must prove the following elements: (1) that the accused voluntarily traveled in interstate commerce or used the facilities of interstate commerce; (2) that he attempted to or did in fact promote, manage, establish, carry on or facilitate the promotion, management, establishment or carrying on of any one of certain statutorily defined activities; and (3) that the accused formed a specific intent to promote, manage, establish, carry on or facilitate one of the prohibited activities.

We turn now to a consideration of the four issues raised on appeal. First, the Appellants contend that the District Court erred in permitting the United States to introduce evidence that the Appellants may have been "skimming" or embezzling funds from the bingo game which they were reputedly operating for the benefit of a charity known as the Speers Society.

The Government introduced evidence from an officer of the Speers Society that the Appellants were to operate

the bingo games in behalf of the Speers Society and certain other charitable causes. Immediately thereafter the Government, over the Appellants' objections,[2] introduced testimony and evidence, in the form of accounting records compiled by the F.B.I., which showed an apparent discrepancy between the net profits the Appellants reported to the Speers Society and the net profits the witness believed the bingo operation actually generated. From this evidence, the jury may have reasonably inferred that the Appellants had retained for their own use income from the bingo operation which was to have gone to the Speers Society.

This testimony was relevant as cumulative evidence for the proposition that Appellants jointly operated a large bingo operation, and also as telling evidence that Appel-

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[2] "The Court: . . . . the United States has a right to show the amount involved here. It is like a bank robbery. You can't just say the bank was robbed. You have a right to show it was robbed of $16,000.

"Mr. Nelson: Your Honor, if they are running a bingo game —

"The Court: It goes to intent. Your statement to the jury was they didn't intend to do anything wrong.

"Mr. Nelson: They didn't intend any interstate activity.

"The Court: Well, of course, you have got evidence here to the effect that there was interstate transactions.

"Mr. Nelson: Not by these defendants.

"The Court: No, but by the Latin Quarter and proof that these defendants were in charge of the Latin Quarter. That is the position of the United States on it.

"Mr. Nelson: Oh, no.

"The Court: I'm not saying that they have or have not proved it, but that is their theory.

"I overrule your objection. I think they have a right to show this.

"Mr. Perrin: Your Honor, for the record, I would like to say that in addition to what Your Honor has stated, that we have to show it was a business activity. Now, these records run to the day before the raid. Our contention is that they show the bookkeeping on it at the establishment and that it was bookkeeping.

"The Court: I think you have a right to show that.

lants had actual control over the gambling operation and that they exercised their control over the gambling revenues with the requisite statutory specific intent to "promote, manage, establish, carry on or facilitate" a gambling operation. No other evidence introduced by the Government so plainly indicated the autonomy of control of the Appellants over the bingo games and the concomitant specific intent of the Appellants to establish a bingo operation as did the accounting evidence to which Appellants object.

Although we find the accounting evidence highly relevant to the instant indictments, it did also raise an inference that the Appellants were engaged in criminal conduct contemporaneous to and as an integral part of their bingo operation. As a general rule, evidence of marginally relevant prior or contemporaneous criminal conduct of an accused is not admissible in a trial of the accused because of its tendency to prejudice and inflame the jury and possibly deprive an accused of a fair trial on the substantive crime for which he is charged. See generally, Wigmore On Evidence (3d ed.) §§ 194, 300-304, 305, 306 (3). But here we are dealing with clearly relevant and important evidence on the issues of the degree of control, the scope of the operation and the existence of a specific intent to manage a gambling enterprise. The "accounting" testimony as it related to other criminal conduct was "part of" the gambling operation "and so closely related to the" elements of the indictment "that it could not be separated into two parts." *United States* v. *Compton*, 365 F.2d 1, 4 (6th Cir. 1966). Under such circumstances, we find the District Court did not abuse its discretion in permitting the Government to introduce its full accounting testimony.

Second, the Appellants contend the District Court erred in failing to charge the jury properly with regard to the limited uses they could make of the evidentiary inferences

of "skimming" by the Appellants. *See United States* v. *Bruni*, 359 F.2d 802, 806 (7th Cir. 1966).

The District Court carefully instruced the jury that under the laws of the State of Kentucky bingo is an illegal lottery and it does not matter

> "one bit and it is not for you [the jury] to decide whether this was a good lottery or a bad lottery or whether it was a good bingo game or a bad bingo game, whether its object was worthy or unworthy, whether it was for selfish purposes ["skimming"] or for purely beneficient purposes [Speers Society and other charitable causes]."

The above instruction contemplated the possibility that the jury may have been improperly influenced by the Government's accounting evidence which suggested the existence of "skimming" by the Appellants. The Court's failure to elaborate more fully on the evidence of embezzlement may have reflected its desire not to dwell unduly on the possibility of contemporaneous criminal conduct. We find the District Court's charge to the jury properly instructed them — albeit in general terms — with regard to their use of the evidence relating to "skimming."

Third, the Appellants contend the District Court erred in excluding certain evidence and admonishing the jury that even if the Appellants believed bingo operations were lawful in Kentucky that such a good faith belief was no defense to the charges for which they were indicted.

In order to assert a defense of mistake of law based upon a good faith reliance on the representations of public officials, the Appellants must demonstrate that they received communications from public officials in a situation in which reliance would have been justified. While the record may contain an avowal that the Sheriff of Campbell County, Mr. Ratterman, informed the Speers Society that bingo

for charitable purposes was lawful in Kentucky, it does not contain any direct proof that any official of the Speers Society relayed the Sheriff's alleged assurances to any of the Appellants. Further, there is no evidence in the record that if the Appellants knew of the Sheriff's alleged assurances, that they possessed such knowledge before they began to manage their bingo operation in the Latin Quarter. In that there is no evidence either by offer of proof or by testimony at trial that Mr. Ratterman ever assured the Appellants directly or indirectly that charitable bingo was lawful in Kentucky, we find the District Court properly excluded evidence as to his alleged conversations with an officer of the Speers Society. We further find the District Court properly admonished the jury not to consider the defense of good faith reliance on the representations of a public official.

Finally, the Appellants contend that the instant prosecutions were so selective and discriminatory as to be violative of the Appellants' rights to due process of the law under the Fifth Amendment. The parties stipulated that prior to the indictments under 18 U.S.C. § 1952 (a) (3) in Eastern Kentucky during 1968, there had been no previous federal indictments charging a violation of 18 U.S.C. § 1952 founded solely upon an illegal state lottery in the form of bingo.

It is clear that the federal government may act in so discriminatory a fashion in its enforcement of the laws as to constitute a denial of due process under the Fifth Amendment. *Boiling* v. *Sharpe,* 347 U.S. 497 (1954), *Yick Wo* v. *Hopkins,* 118 U.S. 356, 369 (1886), *Washington* v. *United States,* 401 F.2d 915, 922 (D.C. Cir. 1968). But the record in this case is devoid of any evidence that in exercising its broad authority of prosecutorial discretion, the United States' decision to prosecute the Appellants was

based upon some invidious or inherently suspect classification such as ones based upon race, religion, wealth or political beliefs. There being no showing that the prosecutor's decision to prosecute was based "upon an unjustifiable standard," *Oyler* v. *Boles,* 368 U.S. 448 (1962), we find the United States did not violate the Fifth Amendment rights of the Appellants by the exercising of some selectivity in enforcement. *Oyler* v. *Boles, supra; Yick Wo* v. *Hopkins,* 118 U.S. 356, 373-374 (1886); *Washington* v. *United States,* 401 F.2d 915, 924-925 (D.C. Cir. 1968).

We have considered all other issues raised by the Appellants and find them without merit.

Affirmed.

APPENDIX C

Judgments

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 20,425

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

GEORGE SERIEN GEBHART,
Defendant-Appellant.

BEFORE: CELEBREZZE and MILLER, Circuit Judges and O'SULLIVAN, Senior Circuit Judge.

JUDGMENT

(Filed May 7, 1971)

APPEAL from the United States District Court for the Eastern District of Kentucky

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Kentucky and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs awarded. Rule 39 (b)

Entered by order of the Court.
/s/ CARL W. REUSS, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 20,426

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

DAVID FLEMING WHITFIELD,
Defendant-Appellant.

BEFORE: CELEBREZZE and MILLER, Circuit Judges and O'SULLIVAN, Senior Circuit Judge.

JUDGMENT

(Filed May 7, 1971)

APPEAL from the United States District Court for the Eastern District of Kentucky

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Kentucky and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs awarded. Rule 39 (b).

Entered by order of the Court.
/s/ CARL W. REUSS, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 20,427

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

HAROLD CORDELL SMITH,
Defendant-Appellant.

BEFORE: CELEBREZZE and MILLER, Circuit Judges and O'SULLIVAN, Senior Circuit Judge.

JUDGMENT

(Filed May 7, 1971)

APPEAL from the United States District Court for the Eastern District of Kentucky

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Kentucky and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs awarded. Rule 39 (b).

Entered by order of the Court.
/s/ CARL W. REUSS, Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 20,425, 20,426, 20,427

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

GEORGE SERIEN GEBHART, DAVID FLEMING WHITFIELD and HAROLD CORDELL SMITH,
Defendants-Appellants.

ORDER

(Filed June 24, 1971)

Before: CELEBREZZE and MILLER, Circuit Judges, and O'SULLIVAN, Senior Circuit Judge.

The petition of Defendants-Appellants for rehearing in banc has been considered. None of the judges of this court who are in regular active service has favored ordering consideration in banc.

It is ORDERED that the petition for rehearing be, and it is hereby, denied.

ENTERED BY ORDER OF THE COURT
/s/ JAMES A. HIGGINS, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-112

GEORGE SERIAN GEBHART, DAVID FLEMING WHITFIELD, AND HAROLD CORDELL SMITH, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. B) is not yet reported.

JURISDICTION

The judgments of the court of appeals were entered on May 7, 1971 (Pet. App. C). A petition for rehearing was denied on June 24, 1971 (Pet. App. D). The petition for a writ of certiorari was filed on July 22, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the affidavit involved here failed to demonstrate probable cause for issuance of a warrant to search the Latin Quarter, a bingo house in Wilder, Kentucky.

2. Whether the prosecution of petitioners was the result of selective discrimination in enforcement of the underlying statute in violation of the Due Process Clause of the Fifth Amendment.

STATEMENT

After a trial by jury in the United States District Court for the Eastern District of Kentucky, petitioners were convicted of conspiring to use the facilities of interstate commerce to promote gambling, in violation of 18 U.S.C. 1952(a)(3) and (b). Each was sentenced to imprisonment for a year and a day (App. 13–18, 23–29).[1] The court of appeals affirmed (Pet. App. B).

The sufficiency of the evidence to sustain the convictions is not questioned. The evidence was that petitioners from 1964 to 1967 had managed a game of bingo on a large scale at the "Latin Quarter" near Newport, Kentucky, ostensibly for the benefit of a charity. During this period they had ordered a variety of bingo equipment from "Bingo King," a company in Englewood, Colorado; the orders were filled through the United States mails and by air freight. At the time of a raid on the Latin Quarter, conducted by F.B.I.

[1] "App." refers to defendants' appendix in the court of appeals, which the government is lodging with the Clerk of this Court.

agents pursuant to a search warrant issued by the U.S. Commissioner on March 1, 1968, a large quantity of the materials and equipment seized bore marks identifying them as originating with this Colorado company (Pet. App. 19).

ARGUMENT

1. Petitioners challenge here the validity of the March 1, 1968 search warrant on the ground that the affidavit of F.B.I. Special Agent John M. Barry, on which the warrant was based, contained no precise dates when the equipment was allegedly shipped interstate and failed to specify what interstate facility was used. The contention was never raised on petitioners' pre-trial motions to suppress evidence, in which they objected to the same affidavit on separate grounds,[2] and thus was never presented to the trial

[2] In the pre-trial suppression motions, petitioners Smith and Gebhart contested the validity of the search warrant essentially on grounds that the affidavit involved here failed to state the commmission of an offense against the United States and that the warrant itself improperly described the premises (App. 8–12). Petitioner Whitfield filed no motion to suppress. At the hearing on the motions, no contention was made that the affidavit was inadequate to sustain the issuance of the search warrant because it failed to specify the dates of, and the interstate facilities used for, interstate shipments (App. 32–48). Rather, the assertion was that the Bingo King trademark on bingo cards and the reference to Globe Ticket Company, Philadelphia, on the coupon tickets "are the only two references at all to any interstate shipment and certainly don't indicate any interstate travel, and I think in view of that, the affidavits having in no sense any personal knowledge of Mr. Barry, but being based solely on hearsay, are insufficient in addition to the fact that the property is not the property described" (App. 48). The trial court denied the motions (App. 12, 48–54).

court. At all events, the claim is insubstantial and does not warrant review by this Court.

The affidavit of F.B.I. agent Barry (Pet. 4–7) states that he was assigned to investigate possible interstate gambling operations in the State of Kentucky, "particularly the conduct of gambling operations at the Latin Quarter, 10 Licking Pike, Wilder, Kentucky" (Pet. 4). It shows that, on various named dates, he and F.B.I. Agent Lutes had entered the Latin Quarter, which has a large bingo room, a bar area and a room off the bar, had purchased bingo cards at $1.50 each, and had played numerous games of bingo. The cards, carrying the name of the Latin Quarter and a printed sketch of its building, bore the trademark of Bingo King, Englewood, Colorado. According to the affidavit, each player obtained, with the card, duplicate coupons for drawings on subsequent nights; printing on the coupons indicated that they were printed for the Latin Quarter by the Globe Ticket Company, Philadelphia. On the basis of these facts, affiant stated that he had "probable cause to believe that facilities in interstate commerce to wit: mails, and air freight, were used and are being used to carry on gambling operations in violation of the laws of the State of Kentucky, at the Latin Quarter * * *, in violation of Section 1952 of Title 18, United States Code * * *" (Pet. 6).

Affidavits for search warrants, "normally drafted by nonlawyers in the midst and haste of a criminal investigation," are to be read by magistrates and the courts "in a commonsense and realistic fashion," with-

out regard to "[t]echnical requirements of elaborate specificity once exacted under common law pleadings * * *." *United States* v. *Ventresca*, 380 U.S. 102, 108; *United States* v. *Harris*, No. 30, October Term, 1970, decided June 28, 1971. Such a reading of the affidavit here in question indicates clearly that the affiant had witnessed an extensive gambling operation, being carried on in defiance of federal law. His failure to designate precise dates of interstate shipments does not detract from his conclusion concerning probable cause. There can be no real question in this case that the alleged shipments took place prior to the issuance of the search warrant and that probable cause thus existed on the date of issuance. Cf. *Sgro* v. *United States*, 287 U.S. 206.[3]

2. Petitioners claim that they were denied due process under the Fifth Amendment because they, and other bingo-game operators in the same area, had been singled out for prosecution under a statute that allegedly had not previously been enforced by the federal government (Pet. 16).[4] They rely on *Yick Wo* v. *Hopkins*, 118 U.S. 356, which involved a discrimina-

[3] Petitioners' suggestion that this case is controlled by *Rosencranz* v. *United States*, 356 F. 2d 310 (C.A. 1), on the ground that the interstate shipments involved here may have occurred prior to September 13, 1961, the effective date of the statute (18 U.S.C. 1952) under which petitioners were prosecuted, is wholly unfounded. The affidavit reveals plainly that the bingo cards and the duplicate coupons had both been printed out of state for explicit use of the Latin Quarter, and the Latin Quarter was not in operation before 1964.

[4] See, however, *Dillon* v. *United States*, 391 F. 2d 433 (C.A. 10), certiorari denied *sub nom. Duggar* v. *United States*, 393 U.S. 825.

tory denial by a San Francisco board of supervisors of its consent to Chinese applicants seeking permission to operate laundries in non-fireproof buildings. In that case, however, the Court found that the conclusion was irresistible that the reason for such action was hostility to members of a particular race. It was this element of intentional or purposeful discrimination that constituted a violation of constitutional rights. And see, *Snowden* v. *Hughes,* 321 U.S. 1, 8–9; *Oyler* v. *Boles,* 368 U.S. 448, 456; *Powell* v. *Power,* 436 F. 2d 84, 88 (C.A. 2); *United States* v. *Sacco,* 428 F. 2d 264 (C.A. 9), certiorari denied, 400 U.S. 903; *Newman* v. *United States,* 382 F. 2d 479, 480–481 (C.A.D.C.); *Moss* v. *Hornig,* 314 F. 2d 89, 92–93 (C.A. 2); *United States* v. *Rickenbacker,* 309 F. 2d 462, 464 (C.A. 2), certiorari denied, 371 U.S. 962. But here, there is no evidence of such purposeful discriminatory action. Petitioners' gambling establishment was one of five that were raided the same night. All the operations employed the same method of gambling techniques; all those arrested were indicted; and all the cases were successfully prosecuted. The claim of "selective" prosecution is thus wholly without basis and warrants no further review by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST 1971.

U. S. GOVERNMENT PRINTING OFFICE: 1971

Supreme Court, U.S.
FILED
SEP 17 1971
E. ROBERT SEAVER, CLERK

NO. 71-112

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1971

GEORGE SERIAN GEBHART, DAVID FLEMING WHITFIELD, AND HAROLD CORDELL SMITH,
Petitioners,

vs.

UNITED STATES OF AMERICA.

On Petition For a Writ of Certiorari To The United States Court of Appeals for The Sixth Circuit

REPLY BRIEF FOR PETITIONERS

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UNITED STATES OF AMERICA.

On Petition For a Writ of Certiorari To The United States Court of Appeals for The Sixth Circuit

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REPLY BRIEF FOR PETITIONERS

The United States on page 3 of its printed Brief in Opposition to the Petition for Writ of Certiorari contends that "The contention was never raised on Petitioners' Pre-Trial Motions to suppress evidence . . . and thus was never presented to the trial court." This argument was first raised by the United States in its Brief in Opposition, and the purpose of this Reply Brief is to point out the factual inaccuracy of this statement and argument.

Petitioners first filed a Motion to Suppress Evidence (App. 11a) and therein stated that the search warrant was invalid in the following respects: "that the said warrant

was based solely on the Affidavit of John M. Barry, which was attached thereto, which Affidavit fails to state any offense against the laws of the United States upon which the United States Commissioner could have found probable cause that any such laws were being violated."

A hearing was held on the Motion to Suppress Evidence and at that hearing the then counsel for Petitioners stated: ". . . Printing on these tickets indicate that they were printed for the Latin Quarter, Newport, Kentucky, by the Globe Ticket Company, Philadelphia. Those are the only two references at all to any interstate shipment and certainly don't indicate any interstate travel, and I think in view of that, the affidavits having in no sense any personal knowledge of Mr. Barry, but being based solely on hearsay, are insufficient in addition to the fact that the property is not the property described." (App. 48a)

During the trial and after the conclusion of the evidence in chief for the United States, the then counsel for the Petitioners made the following Motion (Transcript of Evidence and Proceedings, Volume 3, Pages 496, 497):

> "MR. DAVIES: Well, just a minute, if the Court pleases. I will make another motion.
>
> At the beginning or after the return of the indictment, the defendants filed a motion to suppress the evidence for the reason that there was not sufficient evidence upon which to issue the search warrant. I think that that has now been emphasized. Your Honor, by the testimony that has been introduced here that these bingo cards *certainly carry nothing that would in any manner establish that they were shipped in interstate commerce or if they were, that they were shipped after September 13, 1961, the effective date of this act,* and so for that reason I want to renew my motion at this time and ask the Court to con-

sider it; it won't have to be done now; of course, Your Honor, it can be done at any time. (emphasis added).

THE COURT: Well, I have considered that motion before and the arguments submitted in support of it. Do you have anything else to say on that?

MR. DAVIES: Not on that.

THE COURT: Let that be overruled."

The United States in its Brief in Opposition has taken a viewpoint contrary to logic. If it is contended that there was no interstate travel, it of necessity follows that there can be no date on which travel occurred nor no mode of facility for the travel. The Motion at the conclusion of the government's case clearly shows that the argument with respect to the date of the travel was clearly before the Trial Court and the Trial Court overruled this argument.

CONCLUSION

Petitioners respectfully submit that this Court grant the Petition for Writ of Certiorari.

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